IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
JUDGES: MICHAEL R. SMOLENSKI, HELENE N. WHITE AND KRISTEN FRANK KELLY

WEXFORD MEDICAL GROUP,

Petitioner-Appellant,

v

CITY OF CADILLAC,

Respondent-Appellee.

Supreme Court No. 127152

Court of Appeals No. 250197

MTT Docket No. 00-276304

APPELLANT'S REPLY BRIEF

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INTRODUCTION AND SUMMARY

Cadillac does not contest the **dispositive** material facts.[1] Instead, it disputes the legal consequences of these undisputed facts and Wexford's statutory construction.[2] Cadillac's Brief, however, fails to negate the following legal conclusions that Wexford's Brief established:

1. Wexford is an exempt charitable institution under GPTA sections 7o(1) and 9(a), given the following undisputed facts: (a) Wexford is fulfilling its and its charitable parents' healthcare mission by providing healthcare access to the public regardless of ability to pay, in a rural healthcare shortage area; and (b) Wexford has provided below cost care totaling almost $2 million over the subject period, including charity care for the indigent (which in 2000 and 2001 included thirteen patients who received $2,358 in free care), plus below cost care for Medicaid and Medicare patients, who comprise over half of the 40,000-plus annual patient visits and for whom reimbursement is below Wexford's costs.
2. The services that Wexford undeniably provides to the entire public, including immunizations, treatment of contagious diseases, and health screening and education programs, satisfy the public health exemption of GPTA section 7r.
3. Wexford is **not** a "fairly typical medical office," in part because of the undisputed facts described above, and, even if it were, as a matter of law, Wexford would still be exempt under GPTA sections 7o(1), 9(a) and 7r.
4. Given the undisputed facts, denying Wexford exemption would "impose a threshold level of charitable care or public health services" that the Legislature has not enacted. May 12, 2005 Order Granting Wexford Leave.

As detailed below, these undisputed facts and Cadillac's significant errors, **which include the errors in the decisions below**, warrant this Court's reversing the Court of Appeals and exempting Wexford under GPTA sections 7o(1), 9(a) and 7r.

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[1] "Cadillac" means the City of Cadillac. As in Wexford's Brief on Appeal ("Wexford's Brief") filed in July, "GPTA" means the General Property Tax Act, the "charitable institution exemptions" are those in GPTA sections 7o(1) and 9(a), MCL 211.7o(1) and MCL 211.9(a), and the "public health exemption" is that in GPTA section 7r, MCL 211.7r, for property used for "public health purposes...." The "decisions below" refers to the Court of Appeals and Tax Tribunal decisions in this case.

[2] As an initial matter, Cadillac wrongly urges this Court to defer to the Tax Tribunal's statutory construction when Const 1963, art 6, §28 provides otherwise. Further, this Court has often said, including in its reversal of a Tribunal decision, that questions of statutory construction are reviewed *de novo*. *Danse Corp v Madison Hts*, 466 Mich 175, 178; 644 NW2d 721 (2002) and *Yaldo v North Pointe Ins Co*, 457 Mich 341, 344; 578 NW2d 274 (1998).

I. THE UNDISPUTED MATERIAL FACTS FIT SQUARELY WITHIN THE CHARITABLE INSTITUTION EXEMPTIONS OF GPTA SECTIONS 7o(1) AND 9a.

A. The Uncontested Facts Satisfy The Clear Language Of The Charitable Institution Exemptions.

Cadillac's Brief does not, nor could it, deny the facts described in Wexford's Brief, at 1-8, which compel the conclusion that Wexford is charitable and exempt under the clear language of GPTA sections 7o(1) and 9(a). Cadillac thus resorts to manufacturing legal hurdles that are not in the GPTA's clear language, and which, if adopted, would reflect judicial activism at its worst.[3]

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[3] Similarly, the Municipal League and Township Association's Amicus Brief (the "Municipal Amicus") creates facts that neither Cadillac, nor the decisions below ever imagined. The Municipal Amicus at 15 suggests, without any record citation, that Wexford's losses were not due to its open access policies, but to factors such as: (1) poor location (yes, a rural, poor, designated healthcare shortage area is an awful location for a profit seeking healthcare provider, as shown by Wexford buying its property from a financially distressed healthcare provider, but Wexford's charitable mission--like that of its charitable parents--is to serve the public, especially the underserved); (2) inadequate patient numbers and lack of community acceptance (to the contrary, App at 8a, 92a and 117a show that Wexford had averaged 40,000 to 44,000 annual patient visits and the subject facility is the area's largest primary care provider); (3) high rent (to the contrary, Wexford owns the facility); and (4) overcompensation, excessive overhead, and ineffective management (the evidence was that Wexford's physician compensation was "on the low end of the scale when compared to state and national medians," that the missions of Wexford's charitable parents were to serve the "poor and underserved...and to use the resources available...in a smart fashion" and that Wexford's rural health clinic designation meant that Wexford had "been surveyed by the state and deemed to be in compliance with a pretty strict set of standards for how [Wexford] treat[s] patients and the way that" Wexford runs its facility. App at 52a-53a and 60a).

The Municipal Amicus, at 15 and 16, makes other misrepresentations about Wexford's losses. Even without several amicus briefs confirming that Wexford's losses were due to its open access policies, in particular as to care involving Medicaid and Medicare beneficiaries, the record absolutely shows this. Wexford's Director, Mr. Zdrodowsi, testified that Wexford's losses would have been **significantly** smaller if Wexford had restricted Medicaid and Medicare participants, that healthcare providers consider Medicaid and Medicare participation to be charitable because of the inadequate reimbursement, that other healthcare providers restricted Medicaid and Medicare patients and that Wexford was the only area healthcare provider that accepted all adults without limitation. App at 70a, 73a-77a, 81a, 100a-101a, 115a-117a, and 120a-125a. Mr. MacLeod, Cadillac Hospital's president and chief executive officer who also serves on Wexford's Board, testified that Medicaid and Medicare "often pay at levels that don't

For example, Cadillac contends that providing healthcare access to the public, with resulting losses from below cost care (particularly from Medicaid and Medicare, which Cadillac dismisses as a cost of doing business), does not make Wexford charitable. This Court should reject this argument, which would permit **Wexford and other nonprofit healthcare providers to obtain property tax exemption only by shouldering the extreme and unsustainable burden of refusing government reimbursement for Medicaid and Medicare patients.** The four amicus briefs supporting Wexford confirm that the threshold Cadillac and the decisions below endorse would rewrite the GPTA so as to produce widespread taxation and devastating reductions in charity throughout the State.

Wexford is not merely ensuring access to a social club, museum, or nature preserve, but access to life protecting and sustaining healthcare. Making healthcare available to the entire population regardless of ability to pay, especially in a designated healthcare shortage area, alone makes Wexford a charitable institution. Nor is Wexford's property tax exemption based solely on academic principles of healthcare access. Wexford's open access and charitable policies have resulted in below cost care and losses of almost $2 million, which also establish exemption.

Cadillac also asserts that Wexford is properly taxable under *ProMed Healthcare v Kalamazoo,* 249 Mich App 490; 644 NW2d 47 (2002), because it is a typical medical practice, similar to that of Dr. Betts-Barbus, amongst others.[4] Wexford, however, is anything but a typical

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cover the cost of providing those services," and so consequently healthcare providers either refuse to provide or limit such care. App at 115a. He also corroborated Mr. Zdrodowski's testimony about Wexford's losses and stated that Wexford's unconditionally accepting Medicaid and Medicare patients increased Wexford's losses. App at 115a-116a. **Finally, Wexford would have open access policies, charity care, and below cost care for the public that results in losses, and therefore would be entitled to exemption, even if Wexford's losses were not in large part because of the unrestricted acceptance of Medicaid and Medicare patients.**

[4] Wexford's Brief, at n 6, addressed the testimony of Dr. Betts-Barbus, a pediatrician whose testimony was submitted solely via a deposition transcript. Cadillac does not contest Wexford's

medical practice. A typical medical practice does not ensure critical healthcare access and provide important health education and screening programs, in a rural healthcare shortage area. Nor does a typical medical practice follow free charity care policies and provide below cost care, especially for the poor and elderly, with resulting substantial losses. Indisputably, no typical medical provider would continue such operations after suffering losses like Wexford's.

Furthermore, the clear language of GPTA sections 7o(1) and 9(a) does not provide that exemption is forfeited if healthcare is provided similar to that of a typical medical practice. As described in Wexford's Brief, particularly at 22-26, *ProMed* (on which the decisions below are based), violates the GPTA's clear statutory language and creates an improper charity threshold to the extent it so holds.[5]

Cadillac's Brief, at 20, tries to defend the unlawful extra-statutory threshold of the

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analysis, including that under the GPTA the policies of for-profit providers (which can change at any time) have no bearing on the exemption claims of nonprofits. Instead, Cadillac's Brief at 2, refers to the Tax Tribunal's opinion at App 31a and 32a. However, at App 31a and 32a the Tribunal merely refers to portions of Dr. Betts-Barbus's testimony concerning **her** practice having forty percent Medicaid patients. Cadillac's Brief, at 2, also refers to its Appendix, at 22b and 23b, where including the testimony at 24b, the doctor mentions two doctors who delivered some babies of Medicaid patients and admits not knowing the policies of the other physicians in that group. Nor did the doctor even indicate that she knew whether that group or any of its members accepted Medicaid patients **without restriction**, as does Wexford. *Id.* Furthermore, any speculation that obstetric care was readily available for Medicaid patients is refuted by the testimony that Wexford County had to transport obstetric patients at State expense to another County. App at 71a.

[5] In questioning how Wexford's physician contracts make it exempt, Cadillac raises red herrings. This subject had no bearing on the decisions below. Wexford cannot serve the community without physicians and as noted above, **Wexford's physician compensation was "on the low end of the scale when compared to state and national medians...."** App at 60a [emphasis added]. The covenant not to compete was part of Trinity's standard contract, App at 82a, and the Tribunal specifically found Trinity to be fulfilling its charitable healthcare mission. App at 7a. Without jeopardizing its property tax exempt status, Wexford was entitled to put itself in a position to maintain the critical mass of physicians with the depth and breadth to handle 40,000-plus annual patient visits and provide care to anyone, regardless of ability to pay. Wexford's losing this critical mass, especially with physicians who on their own could have refused to help the poor and underprivileged, would have only worsened the healthcare shortage in the area.

decisions below (which adopted *ProMed's* improper threshold) based on a sentence from *Michigan United Conservation Clubs v Lansing Twp*, 423 Mich 661, 673; 378 NW2d 737 (1985) ("MUCC"). As an initial point, *MUCC* itself is distinguishable. Unlike Wexford's open access policies, *MUCC* restricted access to its property. *Id.* at 673-674. Further, this Court limited *MUCC*'s holding to its specific and distinguishable facts. The sentence Cadillac quotes from *MUCC,* at 673, has words (in bold below) that Cadillac omitted and replaced with ellipses:

> The proper focus **in this case** is whether **MUCC's** activities, taken as a whole, constitute a charitable gift for the benefit of the general public without restriction or for the benefit of an indefinite number of persons. See *Retirement Homes v Sylvan Twp, supra*; *Michigan Baptist Homes v Ann Arbor*, 396 Mich 660, 670; 242 NW2d 749 (1976); *Edsel & Eleanor Ford House v Grosse Pointe Shores*, 134 Mich App 448, 458; 350 NW2d 894 (1984), lv den 419 Mich 961 (1984).[6] [Emphasis added].

Even if this sentence were not limited to *MUCC* itself, this language does not establish any charity threshold, especially one that violates the GPTA's clear statutory language. Instead, a more appropriate application of *MUCC* would be to exempt Wexford because, as described in Wexford's Brief at 20-22, Wexford's activities "taken as a whole, constitute a charitable gift for the benefit of the general public without restriction [and] for the benefit of an indefinite number of persons." *MUCC* at 673.

Similarly, *Kreiner v Fischer,* 471 Mich 109; 683 NW2d 611 (2004), which involved whether an individual met a specific no-fault insurance threshold the Legislature enacted, in no way provides for a charity threshold that the Legislature did not include in the GPTA's clear language. Cadillac highlights the weakness of its position (and of the decisions below) by

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[6] *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc v Sylvan Twp*, 416 Mich 340, 348-350; 330 NW2d 682 (1982) ("*Retirement Homes*") and *Michigan Baptist Homes and Development Co v Ann Arbor, 396 Mich 660; 242 NW2d 749 (1976)*, denied exemption because this Court found no charity. Neither case authorizes a charity threshold which the Legislature has not enacted.

placing so much reliance on such a tenuous authority.[7]

Finally, even if this Court were to read the charitable institution exemptions as allowing a judicially set threshold, it should rule as a matter of law that Wexford has met that threshold. The charity Wexford provides is substantial in quantity and quality. The amicus briefs supporting Wexford confirm that if Wexford is held taxable, there will be less charity throughout the State because of widespread nonprofit taxation, including the "scorched earth" taxation of non-hospital healthcare providers. *See* Michigan Health & Hospital Amicus Brief, at 16.

B. This Court Should Reverse Under *Auditor General* Because Cadillac Does Not Dispute That *Auditor General* Is Factually Indistinguishable, It Instead Erroneously Asserts That *Auditor General* "Interpreted A Separate And Now Defunct Statutory Scheme."

Cadillac does not dispute and thereby concedes that the material facts of *Auditor General v RB Smith Memorial Hospital Ass'n*, 293 Mich 36; 291 NW 213 (1940) ("*Auditor General*"), are indistinguishable from those here. Instead, Cadillac's Brief at 15 only erroneously argues that this Court's *Auditor General* decision "interpreted a separate and now defunct statutory

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[7] None of the non-Michigan authorities Cadillac cites in support of a charity threshold justifying Wexford's taxation, Cadillac Brief at 20, can or should trump the GPTA's clear language. Additionally, of the cases Cadillac cites, the Georgia case comes closest to Wexford's facts. There, following the 2000 Georgia decision Cadillac cites, the subsequent proceedings resulted in property tax exemption, with the Georgia Court stating in part: "As to whether VNHS is devoted entirely to charitable purposes, the fact that some of its patients have payor sources is not dispositive...The evidence showed that the money VNHS collected from some of its patients was used to offset expenses and pay for additional patient care. 'The evidence also showed that [VNHS] provided its services to all in need of assistance, not just to [those who could pay].'" *Fulton County Bd of Tax Assessors v Visiting Nurse Health System of Metropolitan Atlanta, Inc*, 256 Ga App 475, 477; 568 SE2d 798, 801 (2002). The other cases Cadillac cites are easily distinguished. *Bethesda Healthcare Inc v Tax Commr*, 101 Ohio St3d 420, 422; 806 NE2d 142 (2004), involved a fitness center that restricted access by only providing a few slots for the indigent rather than accepting the entire public regardless of ability to pay. *Sturdy Memorial Found Inc v Bd of Assessors of North Attleborough*, 60 Mass App Ct 573, 579; 804 NE2d 368 (2004), also involved a facility that restricted access and provided no below cost care. Equally inapposite is *In re Town of Wolfeboro*, _ A2d _; 2005 WL 1668682 (NH, July 19, 2005), where no charity was shown. And, as noted *infra* at n 9, other non-Michigan decisions support exempting Wexford.

scheme." This argument could not be more wrong. As this Court described in this crucial case, 293 Mich at 38, the auditor general claimed that the hospital was "not a **charitable institution** within the meaning" of GPTA section seven, which then exempted from property taxation:

> Such real estate as shall be owned and occupied by library, benevolent, **charitable**, educational or scientific institutions and memorial homes of world war veterans incorporated under the laws of this state with the buildings and other property thereon while occupied by them solely for the purposes for which they were incorporated. [Emphasis added].

Thus, completely contrary to Cadillac's claim that *Auditor General* "interpreted a separate and now defunct statutory scheme," it actually involved the same GPTA charitable institution exemption and specifically, the same word "charitable," at issue here. It is of no consequence that *Auditor General* referenced the Compiled Laws of 1929, or that in 1980 the Legislature amended the GPTA and included the charitable institution exemption in a newly created GPTA section 7o. The Legislature has not changed the GPTA's charitable institution exemption in any way that makes *Auditor General* distinguishable.

Wexford's analysis of *Auditor General* stands unrefuted. Because the decisions below ignored *Auditor General*, which is dispositive, those decisions contain errors of law, are not authorized by and violate Michigan law and this Court should reverse and grant exemption under GPTA sections 7o(1) and 9(a).[8]

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[8]While Cadillac correctly points out that *Michigan Sanitarium & Benevolent Ass'n v Battle Creek,* 138 Mich 676; 101 NW 855 (1904), did not construe the GPTA, Cadillac's analysis of the case is still fatally flawed. As here, *Michigan Sanitarium* specifically addressed the issue of whether the property tax exemption claimant was charitable. While Cadillac's Brief, at 15, says "the law applied only to 'a hospital, or other charitable asylum and contained no qualifying language," this Court's *Michigan Sanitarium* decision, at 683, clearly found the exemption claimant "sufficiently charitable" to be exempt on facts indistinguishable from this case. Appellant's Supplemental Appendix, 192a – 196a contains the Act that was at issue in *Michigan Sanitarium.* Corroborating that *Michigan Sanitarium* and *Auditor General* both apply here is this Court's citations to both of these cases in its *Retirement Homes* charitable institution exemption decision. *Retirement Homes* at 348 n 13 and 350 n 15 and n 16. Cadillac's Brief ignores *Retirement Homes,* which, as described in Wexford's Brief, at 20-22, supports Wexford's

C. The Undisputed Material Facts Qualify Wexford For The Charitable Institution Exemptions By Virtue Of The Court Of Appeals *Huron Residential Services* Decision, Which Cadillac Completely Ignores.

Cadillac claims that Wexford, by accepting government reimbursement instead of just providing free care, increases government burdens. Cadillac, however, ignores that under *Huron Residential Services For Youth, Inc v Pittsfield Charter Twp*, 152 Mich App 54, 62-63; 393 NW2d 568 (1986) (*"Huron Residential Services"),* one can be charitable and exempt **even if revenue is completely from government reimbursement.** *See* Wexford's Brief at 26-27.[9] Indeed, that decision's criticism of the Tribunal's line-drawing in that case is particularly applicable here: "Will eighty-five percent or fifty-five percent or forty-five percent funding by the state permit an exemption?" *Id.* at 62. Furthermore, the amicus briefs supporting Wexford confirm the taxation, resource drain, and statewide loss of charity that would follow if this Court does not apply *Huron Residential Services* here. Thus, for the reasons stated above and in Wexford's Brief, this Court should reverse and grant Wexford the exemption requested under GPTA sections 7o(1) and 9(a).

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exemption.

[9] *Holland Home v Grand Rapids,* 219 Mich App 384; 557 NW2d 118 (1996), on which Cadillac also relies for its GPTA construction, can be distinguished based on the lack of any gift. The Municipal Amicus, at 19-23, describes numerous non-Michigan cases which, as described, are virtually all irrelevant because, among other reasons, they involved either office buildings leased to for-profits or providers lacking Wexford's open access and charitable policies. Also, the Municipal Amicus fails to mention critical distinguishing facts in those cases. And, while the Municipal Amicus found only one non-Michigan case supporting Wexford, there are several in addition to the Georgia *Visiting Nurses* case Cadillac cites (described above at n 7). These favorable cases include: *In re the Appeal of Found Health Systems Corp*, 96 NC App 571; 386 SE2d 588 (1989); *William K. Warren Medical Research Ctr, Inc v Payne County Bd of Equalization*, 905 P2d 824 (Okla Civ App 1994); *Harvard Community Health Plan, Inc v Bd of Assessors of Cambridge*, 384 Mass 536; 427 NE2d 1159 (1981); *In re University of Kansas School of Medicine-Wichita Medical Practice Assoc*, 266 Kan 737; 973 P2d 176 (1999); and *West Allegheny Hosp v Bd of Property Assessment, Appeals and Review of Allegheny County,* 500 Pa 236; 455 A2d 1170 (1982). This Court is entitled to completely disregard the Municipal Amicus which has misrepresented both the facts and law.

II. THE UNDISPUTED MATERIAL FACTS SATISFY THE PUBLIC HEALTH PURPOSES EXEMPTION OF GPTA SECTION 7r.

In clear statutory language, the GPTA exempts property "used for hospital or public health **purposes**." With the plural, **"purposes,"** the exemption encompasses not just one public health purpose, but a broad array of health uses. As described in Wexford's Brief at 28 - 33, Wexford's many services and programs fall within "public health **purposes**."

Wexford satisfies **"public"** health purposes because it is open to the entire community, whether for treatment or health education, maintenance or screening programs, on a first come, first serve basis, regardless of ability to pay. **Furthermore, Wexford's treatment and prevention of contagious diseases and its health education and screening programs constitute public health purposes because they promote and protect the health of the entire community. An epidemic starts with a single untreated carrier.**

Cadillac says that Wexford serves a health purpose, not a **public** health purpose, because it is a typical medical clinic that does not focus on community health. It relies in part on the deposition transcript of Dr. Betts-Barbus. She, however, not only admitted that she was unaware of Wexford's policies, Supplemental App at 197a - 201a, she said that she is unaware of its mission, bylaws, or financial situation. More importantly, Dr. Betts-Barbus's opinions are irrelevant. The clear language of section 7r does **not** define "public health purposes" as excluding medical care or medical services provided at a typical family clinic. Reading those words into the statute creates an unlawful threshold the Legislature never enacted.

Cadillac and the decisions below would impose another unlawful threshold by insisting that Wexford is taxable because its public education and treatment programs comprise only a small percentage of its budget. Again, the GPTA's clear language creates no such threshold.[10]

[10] On this point, Cadillac and the decisions below grievously err. They disregard that Wexford

Finally, Cadillac claims "public health purposes" should **include** in-patient treatment of approximately thirty mentally ill patients, as in *Rose Hill Ctr, Inc v Holly Twp,* 224 Mich App 28; 568 NW2d 332 (1997), **but exclude** a healthcare center with a wide arsenal of treatment, education and prevention programs, open to the entire public (with upwards of 44,000 annual patient visits), regardless of ability to pay. The words "public health purposes" do not include in-patient and exclude out-patient. If anything, more so than in *Rose Hill*, Wexford fits within the meaning of "public health purposes," and the health code provision (MCL 333.2433(1)) and dictionary definitions on which Cadillac relies.

For the reasons stated above, as well as those in Wexford's Brief, this Court should reverse, and grant Wexford property tax exemption and the relief requested in Wexford's Brief.[11]

Respectfully Submitted

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provides these programs even though it has suffered significant losses. Considering these expenditures as a percent of Wexford's gross revenue, where Wexford's charitable policy of treating the entire public causes significant losses, is unfair and punishes Wexford for serving the public. What a bizarre result: Wexford is taxable by virtue of the revenue required to provide vital healthcare to the entire public, with upwards of 44,000 patient visits, but Wexford could obtain exemption, and reduce its own losses, if it only provided these public education and screening programs! This is not only absurd but contrary to the GPTA's clear language.

[11] Wexford believes it is exempt under GPTA sections 7o(1), 9(a) and 7r, but this Court can exempt Wexford under **either** the charitable institution **or** the public health exemption.